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Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH ZINKER, AS EXECUTOR OF THE ESTATE OF NANCY ZINKER, DECEASED,
Petitioner

v.

J. PAUL DOTY, INDIVIDUALLY AND JUDITH A. KEMP, INDIVIDUALLY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KATHLEEN ELDERGILL
BECK & ELDERGILL
447 Center Street
Manchester, CT 06040
(203) 646-5606

Counsel of Record for Petitioner

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528-4254

QUESTIONS PRESENTED

1. Prior to this Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), did there exist a clearly established constitutional right to a pretermination hearing on the part of a tenured government employee?
2. In determining whether relevant law was clearly established for the purpose of deciding qualified immunity, must a court rely upon prior decisions of this Court, or may it consider decisions of state courts, other district courts and courts of appeals, and the opinions of law review commentators?
3. In order to conclude that relevant law was clearly established so as to defeat a claim of qualified immunity, must there exist a consensus among all authorities, or

simply controlling authority in the jurisdiction which establishes the existence of a constitutional right?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The following were parties to the proceedings before the District Court:

Nancy Zinker, Plaintiff;

J. Paul Doty, Director of Operations and Contract Administration for the Department of Income Maintenance for the State of Connecticut, individually and in his official capacity;

Judith A. Kemp, Agency Personnel Administrator, individually and in her official capacity;

Steven B. Heintz, Commissioner, Department of Income Maintenance of the State of Connecticut, individually and in his official capacity;

Elisha Freedman, Commissioner of the Department of Administrative Services of the State of Connecticut, in his official capacity only.

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Joseph Zinker, as Executor of the Estate of Nancy Zinker, deceased, the Petitioner, prays this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled

proceeding on June 29, 1990, which held that Defendants were entitled to qualified immunity, and directed dismissal of Plaintiff's complaint.

OPINION BELOW

The opinion of the Second Circuit Court of Appeals, which appears in the Appendix hereto, p. 1-A, infra, is reported at 970 F.2d 357.

JURISDICTION

The judgment of the Second Circuit Court of Appeals, holding that Defendants were entitled to qualified immunity, and directing dismissal of Plaintiff's complaint, was entered on June 29, 1990. See p. 1-A, infra. A petition for rehearing was entertained and denied on August 27, 1990. See p. 17-A, infra.

This petition is being docketed in this Court within 90 days from the denial of rehearing below. The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment. United States Constitution:

No State shall ... deprive any person of life, liberty or property, without due process of law ...

STATEMENT OF THE CASE

The original Plaintiff, Nancy Zinker[1], was a permanent state employee whose employment was terminated by Defendants on July 6, 1984 without prior notice, explanation of the evidence against her or opportunity to be heard. Ms. Zinker filed suit in the United States District Court for the District of Connecticut claiming a violation of

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1. Nancy Zinker died on March 31, 1990, and Joseph Zinker was appointed Executor of her estate on May 30, 1990.

her due process rights based on Defendants' failure to provide a pre-termination hearing. The jurisdiction of the District Court was invoked under 28 U.S.C. Sections 1331 and 1343, as Plaintiff's complaint raised a federal question under 42 U.S.C. Section 1983. Defendants raised an affirmative defense of qualified immunity, based on their claim that the requirements of due process applicable to the termination of state employment were not clearly established in July of 1984. After the trial court rejected this defense in its ruling on a motion for summary judgment, a jury found in Ms. Zinker's favor on her due process claim, and awarded $675,000.00 in compensatory damages against the Defendants J. Paul Doty and Judith A. Kemp, individually, and $50,000.00 in punitive damages against each of these Defendants.

On appeal, the Second Circuit Court of Appeals held that Defendants were entitled to qualified immunity, and that their motions for summary judgment should have been granted on this basis.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The court below concluded that Defendants were entitled to qualified immunity, based upon its holding that there existed no clearly established constitutional right to a pretermination hearing on the part of tenured government employees prior to this Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). In its opinion, the Court cited Arnett v. Kennedy, 416 U.S. 134 (1974), and numerous cases relying on that opinion, for the proposition that constitutionally required procedures for

terminating employment constituting a property right are those specified in statutes that create such a right; in other words, the employee must take the "bitter with the sweet". (p. 9-A - 16-A, infra.) In the court's view, this plurality opinion in Arnett v. Kennedy continued in force until the Loudermill case was decided, some five months following Plaintiff's termination. This Court has ruled otherwise.

This Court itself expressly rejected the "bitter with the sweet" reasoning of Arnett v. Kennedy long before Plaintiff's termination in 1984. As noted by this Court's own discussion of the law in Loudermill, the plurality opinion of Arnett never gathered a majority, Loudermill, supra, 470 U.S. at 540-541, citing Bishop v. Wood, 426 U.S. 341, 355-361 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (White, J., dissenting) and

Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) and the theory espoused by the Arnett plurality was "clearly rejected" in Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), 470 U.S. at 541.

In Vitek, the appellants claimed that any state-created liberty interest the appellee had was satisfied by adherence to procedures set forth by state law. 445 U.S. at 490. This Court rejected such a view, holding that due process requirements are a matter of federal law, rather than state law, 445 U.S. at 491, and specifically noted:

> A majority of the justices rejected an identical position in Arnett v. Kennedy, 416 U.S. 134, 166-167, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (opinion of Powell, J., joined by Blackmun, J.), 177-178, 94 S.Ct. 1633, 40 L.Ed.2d 15 (opinion of White, J.), 210-211, 94 S.Ct. 1633, 40 L.Ed.2d 15 (opinion of Marshall, J., joined by Douglas and Brennan, JJ.).

445 U.S. at 490, n.6. This Court went

on to set forth the rationale for rejecting the "bitter with the sweet" theory, as stated by Justice Powell in his concurring opinion in Arnett v. Kennedy. Id.. See also Logan v. Zimmerman, 455 U.S. 422, 432, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) rejecting this same theory (deprivation of property interest.)

Because the Second Circuit's opinion conflicts with prior caselaw of this Court, the petition should be granted.

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL WHICH HAVE CONSIDERED THIS SAME ISSUE.

At least two other courts of appeals, in considering the issue raised here, have ruled that Loudermill did not constitute a departure from existing law, but rather held that the principles set out in Loudermill were clearly established prior to the issuance of

that decision. Both cases analyzed controlling caselaw in reaching this decision. In Peery v. Brakke, 826 F.2d 740 (8th Cir. 1987), the Eighth Circuit relied upon the language of the Loudermill decision in rejecting the defendant's contention that he was entitled to the protection of qualified immunity because the principles announced in Loudermill were not clearly established prior to the issuance of that decision. In so doing, the court stated:

> Loudermill did not, in our view, substantially alter existing law. The decision did not overrule any prior caselaw nor did it extend due process to require any new protections. Long before Loudermill was decided, the right to "some kind of hearing" before termination was well established.

826 F.2d at 744 (citations omitted).

In a second case, Page v. DeLuane, 837 F.2d 233 (5th Cir. 1988), where the

plaintiff claimed she had received no pretermination notice or opportunity to be heard prior to her dismissal, the Fifth Circuit held that such a right was clearly established as early as 1982, well before the Supreme Ccurt's decision in Loudermill. 837 F.2d at 239-240. In both of these cases, the courts rejected defenses of qualified immunity. The decision of this Court below, and the decision of the Fourth Circuit, Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985), reach a contrary conclusion, holding that Loudermill created new law and defendants were therefore entitled to qualified immunity. Because there exists a conflict among different courts of appeal, this Court should grant certiorari on this issue.

III. IN ITS RULING, THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The defense of qualified immunity not only protects government officials from liability for damages, but also renders them absolutely immune from suit. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Because this defense provides an absolute bar to litigants who would otherwise have access to the federal courts to raise constitutional claims, the standards used to determine whether or not the law was clearly established at the time an action occurred, thereby measuring the "objective reasonableness" of an official's conduct, must be consistent and uniform if justice is to be served.

This Court, in Harlow v. Fitzgerald, 457 U.S. 800, 818, n.32 (1982), expressly left open the question of

whether the law existing at the time of a defendant's action should be "evaluated by reference to the opinions of this Court, of the courts of appeals, or of the local district court." In the instant case, the Second Circuit relied upon certain decisions of the Supreme Court of the State of Connecticut, which set forth principles which have since been overruled by more recent cases. See Lee v. Board of Education of the City of Bristol, 181 Conn. 69, 434 A.2d 333 (1980) and Millard v. Connecticut Personnel Appeal Board, 170 Conn. 541, 368 A.2d 121 (1976). The court also relied upon the lower court decisions reviewed by this Court in Loudermill, and reasoned that certiorari would not have been granted in Loudermill if the right to a pretermination hearing were clearly established prior to the Loudermill decision. (See p. 10-A,

infra.) The court not only relied upon briefs of amici submitted in support of the Loudermill petition, but also on after-the-fact analyses by judges and law review commentators which suggested that Loudermill created new law. (See p. 12-A - 16-A, infra.)

Where, as here, decisions of this Court conflict with other authorities, courts will reach different results on the issue of qualified immunity, depending upon which source is relied upon in determining whether the law was "clearly established". Compare the decision below with Peery v. Brakke, 826 F.2d 740 (8th Cir. 1987) and Page v. DeLuane, 837 F.2d 233 (5th Cir. 1988), which rely upon precedent of this Court. This Court can and should provide guidance to the lower courts on this issue, so that a uniform method can be used to determine the important issue of qualified

immunity whenever it is raised.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court stated that the "objective reasonableness" of an official's conduct must be determined by reference to existing controlling caselaw. The court below, in its opinion, appears to assume that a consensus of all authorities must be reached before a "clearly established" constitutional right can be recognized. Such an expansion of the qualified immunity afforded government officials threatens to leave those who suffer constitutional violations with no remedy whatsoever, rather than striking a proper balance between the protection of government officials in the performance of their duties and that afforded individuals whose constitutional rights are violated. Again, this Court can and should provide guidance to the lower

courts as to the degree of certainty needed as to the state of the law, so that decisions on the issue of qualified immunity will be consistent.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted:

JOSEPH ZINKER, as Executor of the Estate of Nancy Zinker, Deceased, Petitioner

By: KATHLEEN ELDERGILL
447 Center Street
Manchester, CT 06040
(203)646-5606

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1252, 1253—August Term, 1989

(Argued April 23, 1990 Decided June 29, 1990)

Docket Nos. 89-9122, 89-9124

JOSEPH ZINKER, as Executor of the Estate of NANCY ZINKER, Deceased,

Plaintiff-Appellee, Cross-Appellant,

—v.—

J. PAUL DOTY, Director of Operations and Contract Administration for the Department of Income Maintenance of the State of Connecticut, individually and in his official capacity; JUDITH A. KEMP, Agency Personnel Administrator, individually and in her official capacity; STEPHEN B. HEINTZ, Commissioner, Department of Income Maintenance of the State of Connecticut, in his official capacity; and ELISHA FREEDMAN, Commissioner of the Department of Administrative Services of the State of Connecticut,

Defendants,

J. PAUL DOTY and JUDITH A. KEMP,

Defendants-Appellants, Cross-Appellees.

Before:

VAN GRAAFEILAND, NEWMAN and KEARSE,
Circuit Judges.

Appeal and cross-appeal from an amended judgment of the United States District Court for the District of Connecticut which followed a jury trial before Judge Cabranes. Judgment reversed and complaint dismissed.

KATHLEEN ELDERGILL, Manchester, Connecticut (Beck & Eldergill, Manchester, Connecticut, of counsel), *for Plaintiff-Appellee, Cross-Appellant.*

HUGH BARBER, Assistant Attorney General, Hartford, Connecticut (Clarine Nardi Riddle, Attorney General, Richard J. Lynch, Assistant Attorney General, Hartford, Connecticut, of counsel), *for Defendant-Appellant, Cross-Appellee J. Paul Doty, Individually.*

ROBERT A. NAGY, Assistant Attorney General, Hartford, Connecticut (Clarine Nardi Riddle, Attorney General, Hartford, Connecticut, of counsel), *for Defendant-Appellant, Cross-Appellee Judith A. Kemp, Individually.*

VAN GRAAFEILAND, *Circuit Judge*:

J. Paul Doty and Judith A. Kemp appeal from an amended judgment of the United States District Court for the District of Connecticut which followed a jury trial before Judge Cabranes. The original judgment awarded Nancy Zinker $675,000 in compensatory damages against Doty and Kemp individually and $50,000 in punitive damages against each of them. The amended judgment, entered in response to the defendants' motion for judgment n.o.v., eliminated the punitive damage awards. Zinker cross-appealed from the district court's order eliminating the punitive damage awards.[1] We reverse the amended judgment on the ground of qualified immunity and remand to the district court with instructions to dismiss the fourth amended complaint.

In 1984, Zinker was a civil service employee of Connecticut's Department of Income Maintenance. Doty was her immediate supervisor, and Kemp was a personnel officer in the Department. The Department had a program pursuant to which employees could earn extra vacation time by working authorized overtime hours. During June of 1984, Doty had several conferences with Zinker, in the course of which he expressed his belief that she was falsifying her work records in order to qualify for unwarranted time off. When Zinker was unable to demonstrate that Doty was mistaken, he told her that he would recommend that strong disciplinary action be taken.

On July 6, 1984, Zinker met with both Doty and Kemp. Although the parties disagree as to what was said

1 Nancy Zinker died on March 31, 1990, and Joseph Zinker was appointed executor of her estate on May 30, 1990.

at that meeting, it culminated in the following letter addressed to Zinker and signed by Stephen Heintz, Commissioner of the Department of Income Maintenance:

> Pursuant to Section 5-240(c) of the Connecticut General Statutes, you are hereby dismissed from State service effective the close of business, Friday, July 20, 1984. However, you should not report for work during the two-week notice period. The Department of Income Maintenance is compelled to take this action for the good of the service as a result of your misconduct as a manager in our Data Processing Unit.
>
> Specifically, you have willfully violated Agency policy regarding prior approval and use of accrued time. You have perpetrated deliberate and serious misrepresentations on your official time sheets, resulting in payment for time not earned and/or not accrued as authorized compensatory time. When given an opportunity by your supervisor to correct the official records, you further exacerbated the situation by presenting documentation which appears to have been fabricated in your attempt to substantiate such use of alleged earned compensatory time. This documentation cannot be verified by any of the Department's checks and balances, nor is it consistent with any of the explanations offered by you to your supervisor.
>
> The Department of Income Maintenance expects its managerial staff to withstand the most stringent scrutiny during the course of their employment with us. Your gross deviation from acceptable conduct in an area of particular sensitivity has significantly

impaired our ability to entrust to you Agency managerial functions and responsibility.

You have the right to appeal this decision by filing a grievance directly to the Commissioner of Administrative Services within twenty-one (21) calendar days of the effective date of the dismissal.

It is with deep regret that we terminate your services with the Department.

Section 5-240(c), referred to in the foregoing letter, reads in pertinent part as follows:

> An appointing authority may dismiss any employee in the classified service when he considers the good of the service will be served thereby. A permanent employee shall be given written notice of such dismissal at least two weeks in advance of his dismissal, except as hereinafter provided, and a copy of the same shall be filed with the commissioner of administrative services. Such notice shall set forth the reasons for dismissal in sufficient detail to indicate whether the employee was discharged for misconduct, incompetency or other reasons relating to the effective performance of his duties and shall be prepared in such form and given in such manner as the commissioner prescribes.

The Connecticut statutes also provide that a dismissed employee such as Zinker may appeal her dismissal directly to the "third level of preliminary review", *i.e.*, the "commissioner of administrative services or his designated representative." Conn. Gen. Stat. Ann. § 5-202(a) and (i). Following the July 6, 1984 meeting, Zinker promptly retained an attorney and appealed her

dismissal in accordance with this statutory provision. The appeal was heard by Theodore Sulla, an experienced labor relations officer, acting as the commissioner's designee. Following a hearing at which the parties were represented by counsel and testimony was taken from witnesses on both sides, Sulla held that "the action taken by the agency was for reasonable cause" and dismissed the appeal.

Although Zinker was authorized by section 5-202(a) to appeal this adverse decision to the employees' review board, a seven member panel organized pursuant to section 5-201, and to have an adverse decision by that board reviewed in the Connecticut courts, *see* section 4-183, she failed to pursue these remedies. Instead, on April 22, 1985, she instituted the instant action, asserting, among other things, a violation of her constitutional right to procedural due process.[2] Adopting Zinker's argument concerning the requirements of due process, the district court charged the jury that if Zinker "was not provided oral or written notice of the charges against her, an explanation of the employer's evidence, and an opportunity to present her side of the story prior to her discharge," her employment was terminated without due process of law. In so charging, the district court rejected the defendants' affirmative defense of qualified immunity, which was based upon their contention that the requirements of due process applicable to the termination of a state employment were not clearly established in July of 1984. We hold that the defendants' motions for summary judgment that were based on their claims of qualified immunity should have been granted.

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2 All of Zinker's claims other than the due process claims against Doty and Kemp were rejected by either the district court or the jury. We discern no error in these rejections.

DISCUSSION

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court discussed the competing societal interests that led to the adoption of the doctrine of qualified immunity. *Id.* at 813-15. The Court concluded that, if public officials are not to be dissuaded from the "unflinching discharge of their duties," they must be shielded from liability in performing their discretionary functions so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 814, 818-19. Because the test of reasonableness thus prescribed is an objective one, the Court held further that, in most cases, the defense of qualified immunity properly lends itself to summary disposition. *Id.* at 818. In subsequent decisions, the Court enlarged upon and refined the rule thus expressed. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law"); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

The Second Circuit has followed the teachings of the above cases and consistently has recognized the defense of qualified immunity where officials operate in an area in which the law has not been charted clearly. *See, e.g., Eng v. Coughlin*, 858 F.2d 889, 897 (2d Cir. 1988); *Giacalone v. Abrams*, 850 F.2d 79, 85-88 (2d Cir. 1988); *Krause v. Penny*, 837 F.2d 595 (2d Cir. 1988); *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187, 211 (2d Cir. 1984); *O'Hagan v. Soto*, 725 F.2d 878, 879 (2d Cir. 1984).

Prior to defendants' complained of actions, the Connecticut Supreme Court of Errors had held that "[w]hen the procedure for the removal of an officer is defined by statute, it is exclusive." *McNamara v. City of New Britain*, 137 Conn. 616, 619 (1951); *see also Gilbert v. Civil Service Commission*, 158 Conn. 578, 581-82 (1969). In accordance with these holdings, the defendants patterned their procedures on the provisions of sections 5-240 and 5-202 of Connecticut's General Statutes. *Cf. Hannifan v. Sachs*, 150 Conn. 162, 166-68 (1962) (decided under former section 5-60 of Connecticut's General Statutes, the predecessor to present section 5-202). Moreover, the constitutionality of former section 5-60 already had been upheld by this court. In *Sessions v. State of Connecticut*, 293 F. Supp. 834, 839 (D. Conn.), *aff'd on opinion below*, 404 F.2d 342 (2d Cir. 1968), Judge Clarie wrote:

> Thus, Connecticut law provides both a fair hearing before the discharge becomes final, and a judicial remedy to assure that this hearing is conducted legally. In view of this, it cannot be said as a matter of law that the petitioner was deprived of any constitutional rights by his discharge from state government employment pursuant to the statutes then in effect.

In *Turrill v. Erskine*, 134 Conn. 16, 21 (1947), a decision that may be viewed as a forerunner to Justice Rehnquist's opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Connecticut Supreme Court of Errors wrote:

> The state, in adopting the merit system law, in effect voluntarily established conditions governing, among other things, the suspension or discharge of

> its employees, with the purpose of protecting them against unjustified suspension or dismissal. The extent to which such protection should be afforded rested entirely in the discretion of the General Assembly. . . . The merit system statute in effect writes into the contract of each employee the conditions which it embodies. All that is required is that the statute should establish those conditions with reasonable certainty.

Thereafter, in *Arnett v. Kennedy*, *supra*, 416 U.S. at 152-55, Justice Rehnquist, with the concurrence of Chief Justice Burger and Justice Stewart, held that, in the field of governmental employer-employee relationships, the constitutionally required procedures for terminating an employment constituting a property right are those specified in the statutes that created the right; in other words, the employee must take the "bitter with the sweet." Justice Powell, writing for himself and Justice Blackmun, concurred in Justice Rehnquist's holding that a prior evidentiary hearing was not required. Although he disagreed with Justice Rehnquist's reasoning, he held nonetheless that the Government's interest in removing the unsatisfactory employee outweighed the temporary interruption of the employee's income while he awaited a post-termination evidentiary hearing. *Id.* at 167-71. Justice White, concurring in a third opinion, stated that the only function of a pretermination hearing is to make a "probable-cause determination as to whether the charges brought against the employee are or are not true," *id.* at 200, and that a full hearing need be held only before termination of employment becomes final by way of administrative appeal, *id.* at 185-86.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court rejected both the "bitter with the sweet" approach of Justice Rehnquist, *id.* at 538-41, and the result reached by Justice Powell in his balancing approach, *id.* at 542-44. It held that "prior to termination" a classified employee is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. Although the Court's decision in *Loudermill* was not handed down until March 19, 1985, some eight months after Zinker received her termination notice, the district court below held that Zinker's right to the pretermination hearing described in *Loudermill* had been "clearly established by the time of plaintiff's dismissal." We disagree.

As most lawyers are well aware, petitions to the United States Supreme Court for certiorari rarely are granted. One of the few situations in which there is even a modicum of likelihood that a petition will be granted is where there is a conflict on a substantial legal issue in the lower courts. *See, e.g., Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 404 (1976); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 225 (1975). That was the ground on which the petitioners in *Loudermill* successfully sought their writ. A review of the record on file in the Supreme Court makes it quite clear that the *Loudermill* Court was not being asked simply to reiterate "clearly established law."

That record discloses that the State of Ohio has a statute, Ohio Rev. Code Ann. § 124.34, that is substantially similar to the Connecticut statutes at issue herein. In *Parfitt v. Columbus Correctional Facility*, 62 Ohio St. 2d 434, *cert. denied*, 449 U.S. 1061 (1980), the Ohio

Supreme Court, relying primarily on *Arnett v. Kennedy*, *supra*, 416 U.S. 134, held that a pretermination hearing in connection with a dismissal under the Ohio statute was not required by the due process clause of the United States Constitution.

In unreported opinions in the companion cases of *Loudermill v. Cleveland Board of Education* and *Donnelly v. Parma Board of Education*, District Judge Manos of the Northern District of Ohio reached the same conclusion. In so doing, he relied upon Justice Rehnquist's opinion in *Arnett v. Kennedy*, *supra*, 416 U.S. 134, and the balancing test advocated by Justice Powell in both *Arnett* and *Mathews v. Eldridge*, 424 U.S. 319, 334-49 (1976). "There can be no doubt," Judge Manos said, "that the conclusion of six (6) members of the United States Supreme Court in *Arnett v. Kennedy*, *supra*, was that the governmental interest in the safe and efficient operation of governmental functions outweighs the employee's interest in continued employment prior to dismissal so that a pre-dismissal hearing is simply not required."

A panel of the Court of Appeals for the Sixth Circuit, with one judge dissenting, reversed. 721 F.2d 550. Judge Timbers, who wrote the majority opinion, recognized that the Supreme Court "has never delineated the situations in which pre-termination hearings are constitutionally required," and that the plurality view in *Arnett* "has yet to be enshrined in our law." *Id.* at 560. He adopted Justice Powell's balancing test but tipped the scales in the opposite direction from that of Justice Powell. Judge Wellford relied upon both Justice Rehnquist's opinion and Justice Powell's concurrence in fashioning his dissent. *Id.* at 564-66.

Both Boards of Education petitioned for certiorari, citing *Arnett* and stressing the fact that the Sixth Circuit's holding conflicted with decisions in other circuits. With respect to the issue of qualified immunity now before us, the fact that similar arguments were made by amici has greater significance. An amicus brief was filed by the Attorneys General of Connecticut, Kansas, Montana, New Jersey, North Dakota, Ohio, Pennsylvania, and Wyoming. Amici's contentions were advanced under the following headings:

A. The Opinion Of The Court Below Is Contrary To Decisions Of This Court In That This Court Has Never Interpreted The Due Process Clause Of The Fourteenth Amendment To Require A Pre-Termination Hearing For A Classified Governmental Employee.

* * *

B. The Opinion Of The Court Of Appeals Is In Conflict With Decisions Of Other Circuit Courts And The Supreme Court Of Ohio.

In support of the first argument, amici cited *Arnett v. Kennedy*, *supra*, 416 U.S. 134, *Parratt v. Taylor*, 451 U.S. 527 (1981), *Mackey v. Montrym*, 443 U.S. 1 (1979), and *Mathews v. Eldridge*, *supra*, 424 U.S. 319. They also relied on the distinction that the Court drew in *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970), between denial of welfare benefits and loss of employment.

In support of the second argument, amici cited *Parfitt v. Columbus Correctional Facility*, *supra*, 62 Ohio St. 2d 434, *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir.

1974), *Ciechon v. City of Chicago*, 634 F.2d 1055 (7th Cir. 1980), and *Webb v. Dillon*, 593 F.2d 656 (5th Cir. 1979). Amici also cited *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982), and *Louise B. v. Coluatti*, 606 F.2d 392 (3d Cir. 1979), as examples of non-conflicting decisions in other circuits.

When the petitions for certiorari were granted, an amicus brief for reversal was filed by the Attorneys General of twenty states. In their opening statement, amici explained their interest in the following words:

> This case provides the Court with an opportunity to finally resolve the polemics precipitated by its plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974) over the degree of procedural due process necessary to protect the federally- or state-created property interests of public employees.

They then cited statutes of thirty-eight states which were somewhat similar to section 124.34 of the Ohio Revised Code "in that they provide for an evidentiary hearing following the effective date of termination from employment." Relying upon the holdings of both Justice Rehnquist and Justice Powell, amici urged the Supreme Court to reverse. A similar amicus brief was filed by the National School Boards Association. Although the arguments thus presented were rejected by the Supreme Court, it is significant for our purposes that the official legal representatives of over twenty states were convinced of their merit, in other words that the law was not "clearly established" to the contrary.

Appellants in the instant case rely, as did amici in *Loudermill*, on *Bullock v. Mumford*, *supra*, 509 F.2d 384, *Ciechon v. City of Chicago*, *supra*, 634 F.2d 1055,

and *Webb v. Dillon*, *supra*, 593 F.2d 656, in support of their argument that the requirement of a pretermination hearing in public employment cases was not clearly established prior to *Loudermill*. Appellants also cite *Newman v. Board of Education*, 594 F.2d 299, 304 (2d Cir. 1979); *Cohen v. City of Philadelphia*, 736 F.2d 81, 84 n.6 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984), and *Detweiler v. Commonwealth of Virginia Department of Rehabilitative Services*, 705 F.2d 557, 560 (4th Cir. 1983), in additional support of that argument. *See also Johnson v. Lefkowitz*, 566 F.2d 866, 869 (2d Cir. 1977), *cert. denied*, 440 U.S. 945 (1979); *Palmer v. Ticcione*, 576 F.2d 459, 464 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *Curlott v. Campbell*, 598 F.2d 1175, 1181-82 (9th Cir. 1979); *Miller v. Williams*, 590 F.2d 317, 320-21 (9th Cir. 1979); *Blair v. Robstown Independent School District*, 556 F.2d 1331, 1334-35 (5th Cir. 1977); *Jacobs v. Kunes*, 541 F.2d 222, 224-25 (9th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Chung v. Park*, 514 F.2d 382, 385-87 (3d Cir.), *cert. denied*, 423 U.S. 948 (1975); *Peacock v. Board of Regents*, 510 F.2d 1324, 1327-30 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975); *Roberts v. City of Tucson*, 122 Ariz. 91, 93 (1979) (en banc).

There are numerous post-*Loudermill* statements by both judges and commentators to the effect that the *Loudermill* decision did indeed establish new law. In *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987), the Circuit Court in which the *Loudermill* holding originated said:

> Not until the United States Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), were tenured public employees held entitled to a

> pretermination hearing consisting of "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546, 105 S.Ct. at 1495.

See also Brown v. Trench, 787 F.2d 167, 171 (3d Cir. 1986); *Leftwich v. Bevilacqua*, 635 F. Supp. 238, 241 (W.D. Va. 1986); *Brubaker v. Arizona Department of Economic Security*, 156 Ariz. 577, ____, 754 P.2d 304, 307-08 (1987); *Lee v. South Dakota Department of Health*, 411 N.W.2d 108, 111-12 (S.D. 1987).

Following the *Loudermill* decision, commentators were in universal accord concerning the unsettled state of pertinent pre-*Loudermill* law. As one commentator described it, "The Supreme Court had yet to definitely come to grips in those prior cases with the issue of whether or not a state could create a *limited* property interest in employment—limited, that is, by the statutory procedures enacted for its deprivation—or whether a property interest once conferred was subject to federal constitutional considerations regardless of any statutorily imposed limitations." The commentator concluded that in *Loudermill* "the Court laid this question to rest." Note, *Federal Pre-Termination Rights for State Employees: Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985)*, 54 U. Cin. L. Rev. 1069, 1079 (1986). *See also* Comment, *Cleveland Board of Education v. Loudermill: Procedural Due Process Protection for Public Employees*, 47 Ohio St. L.J. 1115, 1122 (1986) ("[a]lthough supported by a plurality of only three justices, Justice Rehnquist's opinion in *Arnett* governed the procedural due process rights of public employees until the Court's recent decision in *Cleveland*

Board of Education v. Loudermill."). As another commentator put it, "[t]hus, before this term's decision [*Loudermill*], the controversy was centered on whether the *Arnett* plurality properly determined the law on this issue, or whether due process requires something more than mere compliance with state-defined procedures." Jaff, *Hiding Behind the Constitution: The Supreme Court and Procedural Due Process in Cleveland Board of Education v. Loudermill*, 18 Akron L. Rev. 631, 636 (1985). Professor Davis, in the 1989 supplement to his *Administrative Law Treatise*, said that in *Loudermill* the Supreme Court "moved the law in two directions at the same time", a result that Professor Davis described as "momentous." *Id.* at 302.

Finally, the fact that Chief Justice Rehnquist was not moved to restate his *Arnett* position in dissent at any time prior to *Loudermill* is, in itself, an indication that he did not believe the Court had rejected that position.

In short, with respect to those states which, like Connecticut and Ohio, had established statutory procedures governing the dismissal of classified employees, the requirements of federal due process were not clearly established prior to *Loudermill*. Accordingly, defendants' motions for summary judgment should have been granted. *See Buschi v. Kirven*, 775 F.2d 1240, 1256 (4th Cir. 1985). Since we are directing dismissal of the complaint, it is unnecessary for us to reach the troublesome issue of damages.

Reversed and complaint dismissed.

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UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-seventh day of August, one thousand nine hundred and ninety.

NANCY ZINKER,

Plaintiff-appellee/Cross-appellant,

- V. -

J. PAUL DOTY, et al,

Defendants-appellants/Cross-appellees

DOCKET NO. 89-9122,-9124

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellee/Cross-Appellant NANCY ZINKER

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June one thousand nine hundred and ninety.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND

HON. JON O. NEWMAN

HON. AMALYA L. KEARSE

Circuit Judges,

JOSEPH ZINKER, as Executor of the Estate of

NANCY ZINKER, Deceased,

Plaintiff-Appellee, Cross-Appellant,

- V. -

J. PAUL DOTY, Director of Operations and Contract Administration for the

Department of Income Maintenance of the State of Connecticut, individually and in his official capacity; JUDITH A. KEMP, Agency Personnel Administrator, individually and in her official capacity; STEPHEN B. HEINTZ, Commissioner, Department of Income Maintenance of the State of Connecticut, in his official capacity; and ELISHA FREEDMAN, Commissioner of the Department of Administrative Services of the State of Connecticut,

Defendants,

J. PAUL DOTY and JUDITH A. KEMP,

Defendants-Appellants, Cross-Appellees

89-9122, 89-9124

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United

States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it is reversed and the action be and it hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/
By: EDWARD J. GUARDARO,
Deputy Clerk

ISSUED AS MANDATE. September 6, 1990

BEST AVAILABLE COPY

OCT 30 1990
JOSEPH F. SPANIOL, JR
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH ZINKER, AS EXECUTOR OF THE ESTATE OF NANCY ZINKER, DECEASED,
Petitioner

v.

J. PAUL DOTY, INDIVIDUALLY AND JUDITH A. KEMP, INDIVIDUALLY,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KATHLEEN ELDERGILL
BECK & ELDERGILL
447 Center Street
Manchester, CT 06040
(203) 646-5606

Counsel of Record
for Petitioner

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NANCY ZINKER,
Plaintiff,

vs.

J. PAUL DOTY, ET AL,
Defendants.

CIVIL
H-85-337
(JAC)

JUNE 19, 1987
NEW HAVEN
CONNECTICUT

B E F O R E:
HON. JOSE A. CABRANES, U.S.D.J.

RULING OF THE COURT

Appearances:

For the Plaintiff:

KATHLEEN ELDERGILL, Esq.
Beck and Eldergill
447 Center Street
Manchester, Connecticut

For the Defendants:

HUGH BARBER, ESQ.
ROBERT A. NAGY, ESQ.
BETH Z. MARGULIES, ESQ.
Office of the Attorney General
State of Connecticut
90 Brainard Road
Hartford, Connecticut 06114

THE COURT: Thank you for your patience. I know that you are all more interested in decisions than in elaborate exegeses, so that it's important that you have a decision from the Court as early as possible, and I'm happy to be able to give it to you now.

Upon a review of the entire record, including extensive briefing by the parties, volumes of deposition, affidavit, and documentary evidence, and the argument of counsel here today, I am prepared to rule on defendants' motions for summary judgment.

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986).

In order to grant a motion for summary judgment, the court must find that there is no "genuine issue of material fact" and that "the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In determining whether there is a material issue of fact, the court must "resolve all ambiguities and draw all inferences against the moving party." Schwabenhauer v. Board of Education, 667 F.2d 305, 313 (Second Circuit 1981).

However the party opposing summary judgment "'may not rest upon mere conclusory allegations or denials' as a vehicle for obtaining a trial," but instead "must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." Quinn v. Syracuse Model Neighborhood Corporation,

613 F.2d 438, 445 (Second circuit 1980), quoting SEC v. Research Automation Corporation, 585 F.2d 31, 33 (Second Circuit 1978). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra, 106 S.Ct. at 2553.

Turning, first, to plaintiff's procedural due process claim, there is evidence sufficient to raise an issue of material fact on the question whether Ms. Zinker was provided with an adequate pretermination notice and opportunity to be heard as required by Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1493 (1985).

However, defendants Heintz, Kemp, and Doty argue that the Eleventh

Amendment bars money damages against them in their official capacities, and that they are entitled to qualified immunity in their individual capacities because they took the actions that allegedly violated plaintiff's procedural due process rights in their capacity as government officials exercising discretion in an area in which the law was not clearly established.

The Court, and plaintiff, agree that no money damages are available against defendants in their official capacities; however, prospective injunctive relief is not barred by the Eleventh Amendment.

The question remains whether defendants are entitled to qualified immunity in their individual capacities. While plaintiff argues that defendants were not exercising discretion, but were merely engaged in ministerial duties,

this argument is without merit. Nevertheless, in order to take shelter under the doctrine of qualified immunity, defendants must show not only that they were exercising discretion, but also that the state of the law they are purported to have violated was not clearly established. Harlow v. Fitzgerald, 457 U.S. 800, 181, 102 S.Ct. 2727, 2738.

The precise method for determining whether the state of law is clearly established has never been clearly articulated by the Supreme Court. See Harlow v. Fitzgerald, supra, 457 U.S. at 818 n. 32, 102 S.Ct. at 2738, n. 32. Defendants point to previous Supreme Court decisions and decisions of the Courts of Appeals of other Circuits in support of the position that the right of a public employee with a protectible property interest in her job to a

pretermination hearing was not clearly established prior to the Supreme Court's decision in Loudermill.

However, the Supreme Court in Loudermill stated that the rule requiring "some kind of hearing" prior to the discharge of "an employee who has a constituionally protected property interest in his employment ... has been settled for some time." Loudermill at 1493.

Defendants' citation of rulings in other circuits to the contrary, this Court must agree with the Supreme Court that such a right had been clearly established by the time of plaintiff's dismissal. If plaintiff can establish at trial that defendants did not provide her with adequate pretermination process, defendants may not invoke the qualified immunity defense to bar damages against them in their individual

capacities.

The somewhat artificial distinctions proposed by defendant Elisha Freedman, then Commissioner of the Department of Administrative Services of the State of Connecticut, as to his lack of obligation to provide pretermination procedures that comport with due process under Loudermill cannot be accepted. The State of Connecticut has chosen to structure its relations with its employees so that defendant Freedman had the responsibility to promulgate policies with respect to the termination of public employees.

There is evidence in the record that the Department of Income Maintenance, or "DIM," defendants relied on these policies. If these policies were constitutionally deficient as applied to the plaintiff, then defendant Freedman may be held liable in his official

capacity (the only capacity in which he is named in the complaint) for this failure, because his promulgation of the policies provides the predicate personal involvement for liability under Section 1983. See Williams v. Smith, 781 F.2d 319, 323 (Second Circuit 1986).

However, plaintiff has not put forth any evidence in support of her claims that the "third level" hearing held by Mr. Sulla included "ex parte" consultations or other violations of due process. On the other hand, the argument that the substantive findings of the "third level" hearing are entitled to preclusive effect in this court are completely without merit, inasmuch as they would not even be entitled to preclusive effect at the next level in Connecticut's own administrative process.

In view of the fact that plaintiff

predicates Count One of her complaint on the claim that the combination of pretermination and post-termination process afforded her under Connecticut law is unconstitutional, plaintiff cannot be said to have "waived" any right to have the substance of her constitutional and federal law claims adjudicated in this court.

For the reasons stated above, the motion for summary judgment of defendants Heintz, Doty, and Kemp, and the motion for summary judgment of defendant Freedman as to Count One of the complaint are granted as to the allegations concerning the "third level" hearing only; otherwise, those motions are denied.

We turn now to the First Amendment claim. At the outset, the Court rejects defendants' argument that only Commissioner Heintz can be considered

plaintiff's employer for the purpose of determining the validity of her claim under the First Amendment. The record amply shows the personal involvement of the other defendants in the actions taken against the plaintiff, and in fact, defendants Doty and Kemp's personal involvement appears to have been far greater than that of Commissioner Heintz, which is not surprising given the organizational structure and the function of DIM.

The parties agree as to the legal standard to be applied to plaintiff's First Amendment claim under the rule of Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) and Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1984).

First, Plaintiff must show that her speech was constitutionally protected. Next, plaintiff must show that the

protected speech was a substantial or motivating factor in her dismissal. If plaintiff has met her burden on these two elements, defendant must show that the same decision would have been taken irrespective of plaintiff's conduct. Pickering v. Board of Education, supra; Connick v. Myers, supra; Mt. Health City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693 (1979).

However, in order to avoid excessive intrusion upon the discretion of government officials in managing their office, in all but the most extraordinary cases, judicial intervention to vindicate First Amendment rights will occur only if it is possible to fairly characterize the public employee's speech as touching upon a

matter of public concern. Connick v. Myers, supra, 461 U.S. at 146-47, 103 S.Ct. at 16990. Whether the speech addresses a matter of public concern must, in turn, be determined by reference to "the content, form, and context of a given statement, as revealed by the whole record." Id., 461 U.S. at 147-48, 103 S.Ct. 1690.

Plaintiff's dismissal can still be upheld if the state can demonstrate that its actions were taken to further "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." Id., 461 U.S. 150, 103 S.Ct. 1692. This determination requires an act of "particularized balancing" by the court, depending upon the facts of the case. Id.

In this case, defendants Heintz, Doty, and Kemp argue that the Court need

not even look to the three-part test because the undisputed evidence shows that these defendants were unaware of plaintiff's speech concerning the CLEM system and her opposition to the contracting out that she claims was the basis for her termination. Furthermore, they argue that such speech cannot be characterized as touching a matter of public concern as defined by the Supreme Court in Connick v. Meyers. They also argue throughout their papers that plaintiff was properly dismissed for violating agency rules as to the use of compensatory time, falsifying time records, and failing to acknowledge her errors, so that plaintiff would have been dismissed in any event.

However, plaintiff's affidavits and other evidence in the record cast each of defendants' arguments sufficiently into doubt to preclude the granting of

summary judgment as to this issue.

First of all, there is admissible affidavit evidence to show that defendant Doty was aware of, and opposed Ms. Zinker's position as to CLEM and the alternative of contracting out the eligibility Management System. See Affidavits of Gary R. Thompson and John Ely, attached to Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment.

The subject of Ms. Zinker's speech, with its emphasis on promoting efficiency and conservation of public funds, does touch on an issue of public concern. Furthermore, inasmuch as defendants have argued that they were unaware of this speech, they have naturally not argued that this particular speech disrupted relationships or otherwise impeded the efficiency of the department. Finally,

there is evidence in the record that other employees who used comp. time and kept sloppy records -- including perhaps even Mr. Doty -- were not terminated, and therefore defendants have not been able to show that Ms. Zinker would have been terminated in any event for her alleged offenses.

Accordingly, summary judgment as to Count Two of plaintiff's complaint is denied.

We turn now to the Title VII claims. Defendants Heintz, Doty, and Kemp have mounted a variety of attacks on plaintiff's Title VII claims:

They allege that Paragraphs 14a, 14c, and 14e are beyond the scope of plaintiff's administrative charge; that Paragraph 14e is also untimely; that the claims themselves lack substantive merit; and that some of them fail to state a claim upon which relief can be

granted. They also contend that defendants Doty and Kemp are not proper defendants because they cannot be considered plaintiff's employer under Title VII.

Both parties agree that this Court may consider both claims made in the administrative complaint, and claims "reasonably related" to the original charges. Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (Second Circuit 1984).

Defendants argue that Paragraphs 14a, 14c, and 14e, are not reasonably related to the charges of discrimination in plaintiff's reprimand and dismissal, and that to allow such claims would vastly complicate an already complicated case. On the other hand, DIM defended these charges by emphasizing defendant Doty's history of fair and equitable treatment of Ms. Zinker.

Once defendants raised previous fair treatment as a defense, it seems perfectly logical that plaintiff would be stimulated to demonstrate that her previous treatment was not fair and equitable, and therefore, it can be said, based on defendants' response, that the charges are "reasonably related" to, or naturally grow out of, plaintiff's original complaint.

Defendants also appear to read Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986) too narrowly in their argument that several of plaintiff's claims do not relate to "terms, conditions or privileges of employment." Actual sexual advances do not appear to be a prerequisite to a Title VII claim based on a theory of a "hostile environment." Id. 106 S.Ct. at 2404-2406.

Defendants also argue, however, that

plaintiff has failed to make out a prima facie case on several of her claims, and have provided numerous examples in her deposition testimony in which plaintiff seems to concede that male employees were treated no differently than she was. See, for example, Deposition Testimony of Nancy Zinker, Volume II, at page 64, attached as Appendix to Defendants' Heintz, Doty, and Kemp's Second Revised Memorandum in Support of Motion for Summary Judgment.

The Court must agree with defendants that having had ample time to conduct discovery, plaintiff has produced no more than "conclusory allegations of discrimination which are insufficient to satisfy the requirements of Rule 56(e)" Meiri v. Dacon, 759 F.2d 989, 998 (Second Circuit 1985), particularly as to Paragraphs 14a, 14b, 14c, 14d, 14f, 14g, and 14i. Plaintiff conceded in her

deposition testimony that defendant Doty interfered in the relationship between male managers and their subordinates; that males as well as females may have felt intimidated by Mr. Doty's managerial style; and that females as well as males may have improperly used comp. time without being terminated.

However, the record does indicate that plaintiff has made out a prima facie case as to her termination in Paragraph 14h in that she is a member of a protected class, she was terminated and her job remained open, and that there is evidence to show that the employer's supposed reasons for terminating her may have been pretext.

As to the failure to promote claim in Paragraph 14e, the Court must acknowledge that the process of promotion described is one whose precise workings in practice are difficult to

grasp; in any event, the claim does not appear to be untimely, and the record does not exclude the possibility that plaintiff was treated differently on account of her sex as to the possibility of promotion.

Finally, the Court notes that in their official capacities defendants Doty and Kemp, as well as defendant Heintz, may be considered plaintiff's employer as to the Title VII claim arising from her termination, and that defendant Doty as well as defendant Heintz may be considered her employer for her claim alleging failure to promote. As such, their official successors, if not they themselves, may be held liable to plaintiff for any damages she might prove if she succeeds on her remaining Title VII claims.

Defendants' motion for summary judgment as to plaintiff's claims under

Title VII in Count Three of her complaint is granted as to Paragraphs 14a, 14b, 14c, 14d, 14f, 14g, and 14i, and denied as to Paragraphs 14e and 14h.

In conclusion, for the reasons stated above, defendants' Heintz, Doty, and Kemp's motion for summary judgment and defendant Freedman's motion for summary judgment are denied as to all but the claim in Count One that the "third level" hearing violated due process and the claims in Paragraphs 14a, 14b, 14c, 14d, 14f, 14g, and 14i of Count Three of plaintiff's complaint.

It is so ordered.

We are adjourned.

* * *

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings held on June 19, 1987, in the United States District Court, for the District of Connecticut, at New Haven, before the Hon. Jose A. Cabranes, U.S.D.J.

_____
Official Court Reporter

DATED: _____ 1987.

Supreme Court, U.S.
FILED
NOV 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-750

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH ZINKER, AS EXECUTOR OF THE ESTATE OF NANCY ZINKER, DECEASED,
Petitioner

v.

J. PAUL DOTY, INDIVIDUALLY AND JUDITH A. KEMP, INDIVIDUALLY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

BRIEF OF THE RESPONDENTS IN OPPOSITION

Respondent
J. Paul Doty, Individually

Respondent
Judith A. Kemp, Individually

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD J. LYNCH
*HUGH BARBER
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06101
Telephone: (203) 566-7334

ROBERT A. NAGY
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06101
Telephone: (203) 566-7014

*Counsel of Record

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No. 90-750

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J. PAUL DOTY, INDIVIDUALLY AND JUDITH A. KEMP, INDIVIDUALLY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Second Circuit Court of Appeals is reported at 907 F.2d 357.

STATEMENT OF THE CASE

Joseph Zinker, as Executor of the Estate of Nancy Zinker, deceased, has brought a petition for writ of certiorari asking this Court to review the judgment and opinion of the United

States Court of Appeals for the Second Circuit which held that the respondents were entitled to qualified immunity.

On July 6, 1984, Nancy Zinker (hereinafter, the "plaintiff") was notified in writing of her dismissal from state service, effective July 20, 1984, for her violation of agency requirements relating to the accrual and use of compensatory time. The notice of dismissal informed her of her right to contest the dismissal in accordance with the terms of a state statute which provides for a "third level of preliminary review," a formal administrative hearing before an independent Employee Review Board, and for judicial review of the decision of the Employee Review Board. Conn. Gen. Stat. § 5-202. The plaintiff appealed her dismissal to the third level of preliminary review which consisted of an informal hearing where the parties were represented by counsel and witnesses were called. Following the conclusion of the hearing, a decision was issued upholding the plaintiff's dismissal from state service. The plaintiff did not subsequently avail herself of her opportunity to appeal her dismissal to the Employee Review Board. Under Connecticut law, plaintiff's dismissal from state service was not "final" until the plaintiff availed herself of the authorized administrative reviews. The Employee Review Board is specifically authorized to award "appropriate remedial action" including back pay and reinstatement. Conn. Gen. Stat. § 5-202(b).

The plaintiff's complaint was filed in April, 1985, and asserted, in pertinent part, a violation of the procedural due process requirements that were announced by this Court in March, 1985, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). Specifically, plaintiff's complaint alleged that, "On July 6, 1984, without adequate notice of the charges against her, explanation of the defendant's evidence, or opportunity to present her side of the story, Plaintiff was terminated from employment."

The factual claims of the parties regarding the predeprivation process that was afforded vary in some respects.

However, plaintiff acknowledged in her trial testimony and in responses to requests for admissions (that the jury was instructed to accept as true) that she met on at least two occasions with her immediate supervisor, the respondent, J. Paul Doty, in June, 1984, to discuss her use of compensatory time. Plaintiff acknowledged that during the first meeting Mr. Doty asked where all the overtime had come from, that she had not submitted records documenting her alleged overtime, that she had never previously taken compensatory time, and that she had not requested prior authorization to take compensatory time. Plaintiff further admitted that during a second meeting with Mr. Doty in June, 1984, she was informed that she could not have worked the alleged overtime at the office as claimed, that she had never been authorized to work overtime in order to accrue compensatory time, and that the matter was considered to be serious and severe disciplinary action was being considered. The plaintiff also admitted that on July 6, 1984, she met with Mr. Doty and the respondent, Judith A. Kemp, an Agency Personnel Officer, who informed her of the employment action, summarized the reason why the action was being taken and handed her the notice of dismissal.

The defendants asserted qualified immunity defenses in their answers and moved for summary judgment asserting that the requirements of due process of law were not clearly established prior to this Court's ruling in *Loudermill*. The District Court denied the defendants' immunity defenses in a ruling dated June 19, 1987. Petitioner's Supp. App., 1A. The District Court subsequently reiterated its prior ruling on defendants' renewed motion for summary judgment which was filed in light of this Court's ruling in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987) (requiring the "particular contours" of the right to be clearly established). The trial commenced on May 1, 1989, and the jury was charged with the standard that was enunciated by this Court in *Loudermill*. This enunciation in *Loudermill* occurred some nine months *after* the plaintiff's termination from employment. Judgment was entered on a jury verdict in favor of the

plaintiff for both compensatory damages and punitive damages. The District Court then granted, in part, defendants' Motion for Judgment Notwithstanding the Verdict with respect to the punitive damages, ruling that, "a finding that either of the plaintiff's (sic — defendants) in fact knew, or circumstanced as he was should certainly have known, that he was violating her constitutional rights . . . is unwarranted on the record of this case." Ruling on Motions for Judgment Notwithstanding the Verdict Or For a New Trial, Or For Remittitur, dated October 3, 1989, pp. 5, 6.

The Court of Appeals for the Second Circuit reversed the judgment of the District Court. ruling that the defendants were entitled to their qualified immunity defense. Petitioner's App. 1A, 907 F.2d 357. The plaintiff petitions for a writ of certiorari requesting that this Court review the determination of the Court of Appeals.

ARGUMENT

I. THIS CASE DOES NOT PRESENT ISSUES OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S REVIEW.

The issues presented by the petitioner are not sufficiently important or recurring to warrant this Court's review. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955); *United States v. Abrams*, 344 U.S. 855 (1952).

The issue sought to be reviewed is not one that is likely to recur; therefore, the petition should be denied. The requirements of due process of law applicable to the termination of public employment were not clearly established by this Court until March, 1985, in *Cleveland Board of Education v. Loudermill, supra*. Subsequent to that decision there was litigation in the federal courts, including this action, which raised the question of whether *Loudermill* would be applied retroactively or whether public officials would be entitled to prevail on their qualified immunity defenses. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Those actions, including several cases cited herein, have been finally resolved by the lower courts. Due to the passage of five and one-half years since this Court's decision in *Loudermill*, the issues raised in the petition for certiorari are most unlikely to recur. Accordingly, this Court's review of the decision below would be of limited importance "to the public as distinguished from" the parties involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). The petitioner seeks this Court's review of the decision below in order for this Court to determine whether the court below erred in denying the plaintiff monetary relief. This Court does not sit as a court of error reviewing rulings that are of limited importance to the public at large. The petition should be denied.

II. THE RULING OF THE COURT BELOW DOES NOT CONFLICT WITH ANY PRIOR RULING OF THIS COURT.

In *Loudermill* this Court only considered "what pretermination process must be accorded a public employee who can be discharged only for cause." 105 S.Ct. at 1489. The issue of the qualified immunity of officials who acted to terminate public employees prior to the *Loudermill* decision was not presented to, or considered by, the Court. Accordingly, there is no conflict between the decision of the court below in this action and any ruling of this Court that could warrant this Court's discretionary review of the decision of the court below.

At least three distinct issues were addressed in the *Loudermill* decision. First, this Court considered the issue raised by the plurality opinion of the Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), namely whether the procedural requirements applicable to the termination of a property interest may be limited by the statute that creates the underlying substantive right. Second, whether due process of law requires "some kind of hearing" prior to the initial deprivation of employment, notwithstanding that the employment action may not be "final" under state law until post-deprivation procedures capable of awarding back pay and reinstatement are concluded. Third, the decision established the specific requirements of due process of law that must be provided prior to the initial deprivation of employment when a full post-termination adversarial hearing is available. The defendants maintained throughout this litigation that each of these three issues was sufficiently unclear prior to *Loudermill* so as to entitle them to prevail on their qualified immunity defenses.

On the first two issues considered in *Loudermill*, this Court supported its ruling, in part, by reference to prior decisions of the Court. In doing so, however, the Court was only fulfilling its responsibility to articulate the rationale for its decision, including the consistency of the ruling with prior

decisions of the Court. Nowhere, however, did the *Loudermill* Court consider whether the issues were clearly established for qualified immunity purposes as the immunity issue was not before the Court. Furthermore, the Court's decision contains language that would support a grant of qualified immunity even if the immunity issue had been considered by the Court. For example, on the "bitter with the sweet issue" raised by the plurality opinion of this Court in *Arnett,* the opinion of the Court in *Loudermill* noted that both the District Court and a dissenting Judge on a divided panel of the Court of Appeals for the Sixth Circuit found that procedural requirements could be limited by the statute creating the substantive right. 105 S.Ct. at 1490, 1491. This Court further acknowledged that the "bitter with sweet" theory "has at times seemed to gather some support," citing to *Bishop v. Wood,* 426 U.S. 341, 355-361 (White, J. dissenting) and *Goss v. Lopez,* 419 U.S. 565, 586-87 (Powell, Burger, Blackmun and Rhenquist dissenting) as evidencing support for the theory. 105 S.Ct. at 1492. Finally, this Court acknowledged that "[i]f a clearer holding is needed, we provide it today." 105 S.Ct. at 1493.

As is clear from the ruling of the Second Circuit Court of Appeals in this case, it was far from clear to the lower courts and to legal commentators that prior rulings of this Court had rejected the "bitter with the sweet" approach of the *Arnett* plurality or had required "some kind of hearing" prior to the initial deprivation of employment. The court below properly concluded that, "a review of the record on file in the Supreme Court makes it quite clear that the *Loudermill* Court was not being asked to simply reiterate 'clearly established law.' " Petitioner's App. 10A, 907 F.2d at 361. In support of that conclusion the court below reviewed the ruling of the lower courts in *Loudermill* and its companion case, *Donnelly v. Parma Board of Education,* the writs of certiorari in those actions, and the *amici* briefs of the states (including Connecticut) in support of the grant of certiorari and on the petition for certiorari. Petitioner's App. 10A-14A, 907 F.2d at 360-62. The court below also cited more than forty

decisions that demonstrate uncertainty in the requirements of due process of law applicable to the termination of public employment, including decisions of this Court, the Court of Appeals (including prior decisions of the Second Circuit), the district courts (including decisions of the local district court) and the Connecticut state courts. Petitioner's App. 12A–14A, 907 F.2d at 362–63. Furthermore, four law review commentators were cited in support of the conclusion that the law was not "clearly established" prior to *Loudermill*. Petitioner's App. 15A–16A, 907 F.2d at 363.

On the issue of the particular contours of the required pre-termination hearing, the *Loudermill* Court clearly articulated, for the *first* time, the requirements of due process of law. A year earlier this Court had indicated that, "'But the Court had not determined what kind of hearing must be provided . . . there had been no occasion to specify any minimally acceptable procedures for termination of employment." *Davis v. Scherer*, 468 U.S. 183, 192, n.10, 104 S.Ct. 3017, 3018, n.10. It was not until *Loudermill* that the Supreme Court held that "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 105 S.Ct. at 1495. Plaintiff's complaint alleged, and the jury was charged, with the precise formulation for the requirements of due process that was enunciated by this Court in *Loudermill* — some nine months *after* the plaintiff's termination from employment.

Anderson v. Creighton, supra, provides that in order for the qualified immunity defense to be lost, the right "must have been clearly established in a more particular and hence more relevant sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 107 S.Ct. at 3039. On this issue, there is *no* claim of conflict with the prior decisions of this Court because the particular contours of the right were clearly established for the first time in *Loudermill*. Accordingly, the defendants were entitled to prevail on

their immunity defense and there clearly is no conflict with any prior decision of this Court that would warrant this Court's consideration.

III. THERE IS NO DIRECT CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEAL SINCE THE DIFFERENT RESULTS ACHIEVED ARE ATTRIBUTABLE TO THE PARTICULAR FACTS OF EACH CASE AND TO THE PRE-EXISTING LAW WITHIN THE CIRCUIT.

The results in this case, and the Fourth Circuit decision of *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985), differ from the results achieved by the Fifth and Eighth Circuits in *Page v. DeLuane*, 837 F.2d 233 (5th Cir. 1988), and *Perry v. Brakke*, 826 F.2d 740 (8th Cir. 1987). However, the different results are attributable to the particular facts of each case and the pre-existing law within each circuit. It is not attributable to a conflict between the circuits as to whether prior decisions of this Court had "clearly established" the requirements of due process of law.

The fact that there is no direct conflict between the circuits is best illustrated by the Fifth Circuit decisions of *Page v. DeLuane* and *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989). In *Price* the Fifth Circuit distinguished and limited *Page* by considering it a factual situation where no pre-deprivation process of any kind had been afforded. The Court indicated that, "the rule in *this* circuit prior to *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), required that there be some form of hearing before an employee was deprived of a constitutionally-protected property interest in his employment." 874 F.2d at 260, 261 (emphasis added). However, the Fifth Circuit acknowledged that the prior rulings of the Circuit did not answer "the more difficult questions of how much notice and opportunity are required," 874 F.2d at 261 n.15, and granted

immunity based upon the fact of a "precipitously-called 'conference.' "

By contrast, controlling law in the Second Circuit and in the local district did not require any kind of pre-deprivation hearing when the employment action was not final under state law until post-deprivation procedures capable of awarding reinstatement and back pay were afforded. *Newman v. Bd. of Education of City School District of N.Y.*, 594 F.2d 299 (2d Cir. 1979); *Buck v. Bd. of Education of City of New York*, 553 F.2d 315 (2d Cir. 1977); *Sessions v. State of Connecticut*, 293 F.Supp. 834 (D.Conn. 1968), *aff'd*, 404 F.2d 342 (2d Cir. 1968). Furthermore, the pre-deprivation process that was afforded in this action, even based upon plaintiff's own account of events, at least equals the "precipitously held 'conference' " that was sufficient to invoke immunity in *Price*. Therefore, even the Fifth Circuit would grant immunity under the facts of this case. *Price v. Brittain, supra*. Accordingly, there is no conflict between the Second and Fifth Circuits. The circuits vary only to the extent that the law of each circuit recognized a right to some kind of pre-deprivation hearing — with controlling Second Circuit authority clearly supporting the grant of immunity in this case.

Similarly, in *Peery v. Brakke, supra*, the Eighth Circuit denied the qualified immunity defense, ruling that "at the time Peery was fired, the due process standard later specifically set out in *Loudermill* was a 'clearly established' constitutional standard of which a reasonable person would have known." 826 F.2d at 744, quoting *Harlow v. Fitzgerald*, 457 U.S. at 818. The Eighth Circuit in *Peery*, however, failed to consider factors that were relevant to the grant of immunity by the Second Circuit in this action, by the Fourth Circuit in *Buschi v. Kirven, supra*, and by the Fifth Circuit in *Price v. Brittain, supra*. *Peery*, for example, did not consider controlling law within the circuit on the requirements of due process of law applicable to the termination of public employ-

ment — which factor was relevant to the courts determination in this action, in *Price* and in *Buschi*.[1] The *Peery* Court only considered the second issue addressed in this Court in *Loudermill* — whether "some kind of hearing" was required as a matter of due process of law. The *Peery* Court did not consider the terms of the South Dakota state statute and the continued validity of the *Arnett* plurality opinion of the Court.

By contrast, the court below based its holding, in substantial part, on its finding that this Court had not clearly rejected the "bitter with the sweet" approach of the *Arnett* until *Loudermill*, ruling that "with respect to those states which, like Connecticut and Ohio, had established statutory procedures governing the dismissal of classified employees, the requirements of federal due process were not clearly established prior to *Loudermill*." Petitioner's App. 16A, 907 F.2d at 363.

Accordingly, the different results in these actions are explained by the different factors and issues that the circuits considered. A direct conflict in the application of legal principles is not present.

IV. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This action does not present an important question of law which has not been, but should be, settled by this Court, namely whether immunity decisions should be evaluated by reference to the opinions of this Court, of the courts of appeal, or of the local district court. *Harlow v. Fitzgerald*, 457 U.S.

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[1] In *Buschi*, the Fourth Circuit upheld a claim for qualified immunity, ruling that "it is beyond dispute that at the time of these discharges, which predated the decision in *Loudermill*, the law in this Circuit was plainly understood not to require a pre-termination hearing." 775 F.2d at 1256.

at 818 n.32. See, *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

The issue left open by *Harlow* and *Procunier* is whether a decision of this Court is required in order for the law to be clearly established and the qualified immunity defense to be lost. This Court indicated in *Procunier* that there was no occasion to address that unresolved issue when controlling lower court authority supported the grant of immunity, ruling that "whether the state of the law is evaluated by reference to the opinions of this Court, or the Court of Appeals or by the local District Court, there was no 'clearly established right' " so that "there is thus no occasion to address this case on the assumption that *Navarette* mailing privileges were protected by a constitutional rule of which petitioners could reasonably have been expected to be aware. . . ." *Procunier v. Navarette, supra*, p. 565, n.13. Similarly, this action does not present the question left open by *Harlow* and *Navarette* since the lower court properly found that the prior decisions of the Second Circuit, *Newman v. Bd. of Education of City School District of New York, supra; Buck v. Bd. of Education of City of New York, supra*, and of this local district, *Sessions v. State of Connecticut, supra*, squarely support the grant of qualified immunity in this case.

CONCLUSION

The court below properly identified the standard applicable to qualified immunity questions as enunciated by *Harlow* and refined by subsequent decisions of this Court, including *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity protects "all but the plainly incompetent or those who knowingly violate the law"), and *Anderson v. Creighton*, 483 U.S. at 640. ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") Petitioner's App. 7A, 907 F.2d at 359. The petitioner acknowledges that the court below demonstrated uncertainty in the lower courts; however, petitioner asserts that the defendants should be retroactively held to the standard enunciated in *Loudermill*. Petitioner's position is squarely inconsistent with standards established by this Court in *Harlow*, *Malley v. Briggs*, and *Anderson v. Creighton*, and does not present an important question for this Court's determination. If the lower courts were uncertain, it cannot be objectively clear that the respondents must have understood that their conduct violated plaintiff's rights.

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RESPONDENTS

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD J. LYNCH
Assistant Attorney General

HUGH BARBER
ROBERT A. NAGY
Assistant Attorneys General
P.O. Box 120
Hartford, CT 06101
Tel: (203) 566-7334